FILED

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OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

No._____

JAMES W. DEATON

PETITIONER

V.

U.S. DEPARTMENT OF AGRICULTURE

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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11 pp

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 97-3236

JAMES W. DEATON

Petitioner,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

DECIDED: August 21, 1997

Before NEWMAN, PLAGER, and BRYSON, Circuit Judges.

PER CURIAM.

DECISION

James W. Deaton petitions for review of a final decision of the Merit Systems Protection Board, Docket No. AT-0752-96-0322-1-2, upholding the Department of Agriculture's removal of Deaton from his position with the agency. We affirm.

BACKGROUND

Deaton was employed as a Research Animal Scientist at the Poultry Research Unit of the Department of Agriculture. Effective January 20, 1996, the agency removed him from his position based on (1) misuse of a government photocopying machine: (2) attempted misuse of official government mail: (3) insubordination by failing to follow his supervisor's instructions regarding proper use of the government photocopier and official mail: (4) insubordination by failing to comply with his supervisor's instructions to prepare an acceptable abstract of his research on a timely basis: and (5) insubordination by twice refusing to comply with his supervisor's instructions to specify the training that Deaton thought he needed to meet his performance plan.

Deaton appealed his removal to the Board. An administrative judge issued an initial decision that sustained the agency's charges against Deaton and affirmed his removal. After the initial decision became final, Deaton petitioned this court for review.

DISCUSSION

In his petition to this court, Deaton asserts that the agency's charges against him are not true. The administrative judge, however, considered the evidence in the record, including Deaton's admissions and explanations. After hearing testimony and weighing the evidence, the administrative judge found with respect to charges 1 through 3 that Deaton had used a government photocopier for personal purposes, that he had attempted to use government mail for personal purposes, that he knew the agency's employee specifically prohibited the use of government resources and official mail for personal purposes, and that his supervisor had repeatedly instructed him to abide by that prohibition. Regarding charges 4 and 5, the administrative judge found that despite repeated instructions by his supervisor, Deaton had failed to prepare an acceptable abstract of his research, and that he had refused to specify what training he thought he needed to meet his performance plan. The administrative judge further found that Deaton in effect acknowledged that the intent of his request for training "was to create a lack of training defense since the opportunity to improve his

performance, which he had previously used to avoid termination, would no longer be available to him." The administrative judge added that "there can be no doubt that [Deaton] did not truly believe that he needed additional training to perform the duties of the position which he had been performing for many years." The record contains substantial evidence to support the administrative judge's findings on each of the sustained charges. Deaton further contends that the administrative judge improperly prohibited him from raising a "whistleblowing" defense to his removal. That defense arose from Deaton's allegation that his supervisor made a racially biased statement to another employee. Deaton claims that his disclosure of the supervisor's statement constituted a protected act of whistleblowing within the meaning of 5 U.S.C. Section 1213(a), and that the agency removed him in retaliation for reporting the incident.

Prior to the MSPB hearing, the administrative judge ordered Deaton to provide detailed information to the agency about the alleged whistleblowing disclosure. The administrative judge subsequently found that Deaton's response to that order was "clearly inadequate as

were his responses to the agency's discovery requests concerning the same matters." Based on Deaton's failure to comply with the MSPB hearing, the administrative judge barred Deaton from raising the whistleblowing issue as a defense to his removal.

Deaton has not addressed the issue of the administrative judge's discovery sanction other than to state, irresponsibly and groundlessly, that the administrative judge "has to be a racist simply based on the record he created." On the record before us, we see no reason to upset the administrative judge's determination that Deaton failed to comply with the administrative judge's discovery order or to satisfy the agency's legitimate discovery requests regarding the whistleblowing issue. We therefore uphold the administrative judge's ruling barring Deaton from raising that issue in the appeal from his removal action.

UNITED STATES COURT OF APPEALS FOR THE

FEDERAL CIRCUIT

97-3236

JAMES W. DEATON,
Petitioner,

v.

DEPARTMENT OF AGRICULTURE,
Respondent.

JUDGMENT

On a petition for review of an order of the Merit Systems Protection Board issued in AT0752960322-I-2 on February 26, 1997, denying review of the initial decision dated
September 30, 1996.

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT

DATED: AUG 21, 1997 JAN HORBALY, CLERK

ISSUED AS A MANDATE: October 21, 1997

ORDER

Before NEWMAN, Circuit Judge; PLAGER, Circuit Judge; and BRYSON, Circuit Judge.

A petition for rehearing having been filed by the PETITIONER,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate of the court will issue on October 14, 1997 unless another time becomes appropriate under Rule 41.

FOR THE COURT,
JAN HORBALY, CLERK

Dated: September 23, 1997

Alex Van Veen
Staff Law Clerk

cc: JAMES W. DEATON
REGINALD T. BLADES, JR.

DEATON V AGRICULTURE, 97-3236
(MSPB - AT0752960322-I-2)

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

JAMES W. DEATON,
Appellant,

DOCKET NUMBER
AT-0752-96-0322-I-2

v.

DEPARTMENT OF AGRICULTURE,
Agency.

DATE: JUN 27, 1996

ORDER

The appellant's letter dated June 23, 1996, with attachments, is hereby rejected for the following reasons.

First, the letter makes reference to the human pathogen project in violation of my June 26, 1996 Order. Thus, for this reason alone it must be rejected.

Second, the submission is part of a practice begun by the appellant in prior appeals and stays requests which is unacceptable.

The appellant, in a piecemeal effort, continues to raise arguments, make allegations, and submit documents on a regular basis. A telephone prehearing conference in this case has been scheduled for September 4, 1996. And, the appellant has been ordered to file prehearing submissions prior to that conference. The prehearing package is to be filed as one, single submission which is to include: (1) his statement as to the facts and issues in the case including his defenses, (2) a list of relevant facts, if any, on which he and the agency's representative agree, (3) a list of witness and a brief summary of the expected testimony of each individual, and (4) a copy of his exhibits, including an index. If any of this material continues to be submitted in a fragmentary manner, it will be rejected summarily. Moreover, any failure on the part of the appellant to comply with these instructions may result in the imposition of sanctions.

FOR THE BOARD:

Richard P. Klein
Administrative Judge